87-1617

No. _____

In the Supreme Court of the United States

October Term, 1987

PAUL NEWMAN, GEORGE ROY HILL, AND PAN ARTS PRODUCTION CORPORATION,

Petitioners,

v.

UNIVERSAL PICTURES, a division of UNIVERSAL CITY STUDIOS, INC., and MCA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
ALICIA G. ROSENBERG
611 West Sixth Street
Suite 2800
Los Angeles, California 90017
Telephone: (213) 622-4222
Attorneys for Petitioners

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTION PRESENTED FOR REVIEW

Does a plaintiff who receives fixed residual prices for his past services as a direct result of a price-fixing conspiracy fail to suffer antitrust injury merely because his agreements were executed prior to the formation of the conspiracy?

PARTIES BELOW

Petitioner Paul Newman is an internationally renowned actor. Petitioner George Roy Hill is a well-known director of motion pictures. Pan Arts Production Corporation is a closely held corporation through which George Roy Hill, its owner, markets his services as a director.

Respondent Universal Pictures produces and distributes motion pictures, and is a division of Universal City Studios, Inc. Respondent MCA, Inc. also produces and distributes motion pictures. Universal City Studios, Inc. is a wholly owned subsidiary of MCA, Inc.

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Other Authorities

No. _____

In the Supreme Court of the United States

October Term, 1987

PAUL NEWMAN, GEORGE ROY HILL, AND PAN ARTS PRODUCTION CORPORATION,

Petitioners,

v.

UNIVERSAL PICTURES, a division of UNIVERSAL CITY STUDIOS, INC., and MCA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit denying rehearing and rehearing *en banc* appears as Appendix A, p. A1. The Ninth Circuit's opinion is reported at 813 F.2d 1519 (9th Cir. 1987) and appears as Appendix B, pp. B1-B8. The district court's order dismissing the antitrust complaint appears as Appendix C, pp. C1-C4.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals for the Ninth Circuit affirming the district court's dismissal of the

petitioners' antitrust complaint was entered on April 10, 1987. Petitioners filed a petition for rehearing and rehearing *en banc* on April 20, 1987. The panel directed respondents to file a response to the petition on September 30, 1987. Respondents filed a response on October 20, 1987. The Ninth Circuit denied the petition for rehearing and rehearing *en banc* on December 31, 1987. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
>
> . . .

The Clayton Act, 15 U.S.C. § 15 provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . .

STATEMENT OF THE CASE

A. Jurisdiction and Timeliness of Appeal

Petitioners appealed from a decision of the United States District Court for the Central District of California dismissing their antitrust complaint pursuant to Fed. R. Civ. P. 12(b)(6). The district court had subject matter jurisdiction over the proceedings below pursuant to 15 U.S.C. § 15.

The Court of Appeals for the Ninth Circuit had jurisdiction of the appeal from the district court's decision pursuant to 28 U.S.C. § 1291. On September 30, 1985, petitioners timely filed a notice of appeal pursuant to 28 U.S.C. § 2107 and Fed. R. App. P. 4(c). The Ninth Circuit affirmed the district court's decision on April 10, 1987, and denied the petition for rehearing and rehearing *en banc* on December 31, 1987.

B. Statement of Facts

1. Background

Paul Newman[1] filed an antitrust action against Universal Pictures and MCA, Inc. [hereinafter "Universal"], alleging that Universal and other major motion picture studios engaged in a horizontal buyer price-fixing conspiracy, a per se violation of the antitrust laws.[2] The purpose of the conspiracy was to artificially depress the prices paid to artists for their services in making motion pictures.

In contracting with industry artists, major studios frequently agree to pay key artists a percentage of the gross proceeds received by the studios from exhibition of the film. These contracts are known as profit participation agreements. Historically, the film's gross proceeds were derived from exhibition in movie theatres and on television, including both free television and pay cable channels. Beginning in the late 1970's or early

---

[1]For convenience, this petition will refer to petitioners Paul Newman, George Roy Hill and Pan Arts Production Corporation collectively as "Newman."

[2]As the district court dismissed this action at the complaint stage, all material allegations in the complaint are taken as true and the pleader is entitled to every favorable inference. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

1980's, the studios began to distribute films on video cassettes and discs.[3] Since that time, the studios have enjoyed increasing revenues from the sale and rental of video cassettes and discs.

In or about 1981, Universal and the other major motion picture studios fixed the formula by which the artists' share of video revenues was to be computed. Specifically, the studios agreed that the artists' share would not be calculated from gross video proceeds. Instead, the studios agreed to compute the artists' share from a base of approximately 20% of the gross video proceeds, which were denominated as "production revenues." The remaining approximately 80% of video proceeds would be designated "distribution revenues" and retained by the studios. The studios concocted this formula as a ruse to diminish the artists' share of the burgeoning video revenues.

The studios' price-fixing conspiracy rigged the prices for all artists on an industry-wide basis. The conspiracy applied both to artists who received residual payments under existing profit participation agreements as of 1981 and to those who signed subsequent agreements. The studios were able to fix prices paid under pre-1981 agreements because profit participation is calculated annually based on gross proceeds received by the studio from film exhibition during the previous year. The studios included video revenues in the gross proceeds under pre-1981 agreements, but they calculated the artists' annual share from the fixed base of 20% of gross video revenues pursuant to the conspiracy.

---

[3] All or most of the major studios that produce and distribute motion pictures have established subsidiaries or other entities to distribute the films through video cassettes and discs. Universal and MCA have arranged for MCA Video Cassette, Inc., a subsidiary of MCA, to distribute films that Universal has produced.

Newman was a direct and intended victim of the studios' conspiracy. In the 1970's, Newman executed profit participation agreements with Universal that entitled him to a percentage of the gross proceeds derived from both "The Sting" and "Slapshot." In 1981, Universal included video revenues in calculating Newman's profit participation share of the films' gross proceeds. Pursuant to the price-fixing conspiracy, however, Universal calculated Newman's share based on the fixed 20% of gross video revenues. Newman therefore received artificially depressed prices for his services as a direct result of the price-fixing conspiracy.

2. The Proceedings Below

Pursuant to Clayton Act § 4, Newman filed an action on April 30, 1985 against Universal alleging a horizontal buyer price-fixing conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Universal moved on June 20, 1985 to dismiss Newman's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Universal raised two grounds for dismissal: (1) the complaint did not properly allege a price-fixing conspiracy; and (2) the complaint did not properly allege the conspiracy's anticompetitive effects.

The district court heard Universal's motion on September 9, 1985 and perfunctorily dismissed the complaint without stating the reasons for dismissal. Newman appealed the district court's order to the Ninth Circuit. The Ninth Circuit accepted as true the well-pleaded allegations of a price-fixing conspiracy, the anticompetitive effects of which are presumed, but held that Newman had not suffered antitrust injury.

REASONS FOR GRANTING THE WRIT

A. Introduction

The Ninth Circuit's bizarre holding that Newman, the recipient of fixed prices, does not suffer antitrust injury from the studios' price-fixing conspiracy is directly contrary to this Court's established precedent. Increasingly, lower courts have misused antitrust injury analysis to undermine the substantive laws and deny recovery to plaintiffs whose lawsuits concededly serve the public's interest in antitrust enforcement. The *Newman* case presents this Court with the perfect opportunity to articulate the principles of antitrust injury analysis for the lower courts to ensure that antitrust injury is consistent with the purposes of the antitrust laws and private enforcement.

In its opinion, the Ninth Circuit accepted as true Newman's allegations that the major motion picture studios engaged in a horizontal conspiracy to fix the prices paid to artists for their services in making motion pictures. The conspiracy's anticompetitive effects were presumed. The court also assumed that the price-fixing conspiracy directly and proximately caused Newman to receive fixed prices for his services. Yet the Ninth Circuit concluded that Newman suffered no antitrust injury and dismissed the case.

How is it possible that a direct victim of a horizontal price-fixing conspiracy does not suffer "antitrust" injury? Antitrust injury, as the concept has been developed by this Court, requires that the plaintiff's injury flow from the violation's restraint on competition. Newman's injury, the difference between the fixed price he received and the competitive price, is precisely the type of injury that price-fixing is likely to cause.

The contrary result in *Newman* stems from the Ninth Circuit's rejection of this Court's standard in favor of a more restrictive, hypertechnical test for antitrust injury. That test requires the plaintiff's injury to mirror precisely the violation's most narrowly defined anticompetitive effect. Here, the Ninth Circuit held Newman had not suffered antitrust injury solely because competition for Newman's services had ended prior to the 1981 conspiracy. The studios' price-fixing did not affect Newman's decision to enter into his profit participation agreements for "The Sting" and "Slapshot," which were executed before the 1981 conspiracy.

In reaching its decision, the Ninth Circuit utterly ignored the fact that although competition for Newman's services had ended, the studios' ability to fix the prices paid annually to Newman and all other pre-1981 profit participants continued. The court's antitrust injury test thus eliminated a sizeable number of plaintiffs who, as victims, have the incentive to challenge the studios' conspiracy. The net result is that the studios continue to fix prices with impunity and retain their unlawful profits. Ironically, the Ninth Circuit's antitrust injury test produces an outcome wholly contrary to the antitrust laws it was intended to serve.

B. The Ninth Circuit Misconstrued and Misapplied the Antitrust Injury Requirement

The Ninth Circuit's decision in *Newman* exemplifies the perverse use of antitrust injury analysis to undermine the antitrust laws and curtail private enforcement. Applying the strictest possible antitrust injury standard, the Ninth Circuit required Newman to prove that the studios' price-fixing conspiracy restrained competition as to his services. The net result was that the studios escaped liability because of the fortuity that Newman,

concededly a direct recipient of fixed prices, executed his profit participation agreements before the conspiracy. Yet nowhere does the Ninth Circuit articulate any countervailing policy to justify imposition of an antitrust injury test that produces an outcome so contrary to the Sherman Act. In the words of *Brunswick*, this antitrust injury definition "divorces antitrust recovery from the purposes of the antitrust laws." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977).

Simply stated, the Ninth Circuit's antitrust injury test requires that Newman's injury mirror precisely the most narrowly defined anticompetitive effect of the studios' price-fixing conspiracy.[4] The court first defines the

---

[4]While the Ninth Circuit has produced the greatest number of antitrust injury opinions, other lower courts have seized upon this "mirror image" notion of antitrust injury. These courts similarly require the plaintiff's injury to fall within the violation's most narrowly defined anticompetitive effect. Cumulatively, these precedents have restricted private enforcement and undermined the force of the substantive antitrust laws.

The debate over the appropriate definition of antitrust injury has also created conflicting decisions between circuits as well as within individual circuits. For intercircuit conflict, *compare Aurora Enters., Inc. v. National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982) *with Repp v. F.E.L. Publications, Ltd.*, 688 F.2d 441 (7th Cir. 1982); *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985) *with In re Industrial Gas Antitrust Litigation*, 681 F.2d 514 (7th Cir. 1982), *cert. denied sub nom. Bichan v. Chemetron Corp.*, 460 U.S. 1016 (1983).

For intracircuit conflict, *compare Aurora Enters., Inc. v. National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982) *with Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir. 1987); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1987) *with Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir.) (role of

violation's narrowest anticompetitive effect and then determines whether the plaintiff's injury mirrors those precise effects. Any deviation defeats the plaintiff's right to recovery.

The Ninth Circuit's application of its standard in the *Newman* opinion is instructive. The court assumed that the studios' horizontal conspiracy to fix prices constituted a per se antitrust violation whose anticompetitive effects are presumed. *Newman*, 813 F.2d at 1522-23.[5] However, the court construed the presumed anticompetitive effect as narrowly as possible. In Newman's case, the sole cognizable anticompetitive effect of price-fixing was on the artists' initial decision to contract with studios for his services.

The cryptic holding in *Newman* rests entirely on the fact that Newman's profit participation agreements with Universal were signed between 1972 and 1976, before the price-fixing conspiracy arose in 1981. *Id.* at 1522. The court reasoned that the price-fixing conspiracy could not affect competition for Newman's services at the time the agreements were made. *Id.* Newman's price, negotiated in an open market, reflected his market value at the time the agreements were executed.

The Ninth Circuit's requirement that the plaintiff's injury mirror the unrealistically narrow view of the

---

substantive law in determining antitrust injury), *cert. denied*, 469 U.S. 1018 (1984).

[5]At one point in its opinion, the Ninth Circuit appears to suggest that if the conspiracy does not cause Newman antitrust injury, "there can be no antitrust violation." 813 F.2d at 1522. Clearly, however, determination of the existence of the antitrust offense and antitrust injury requires distinct analyses. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977).

anticompetitive effects of price-fixing is flatly inconsistent with this Court's articulated antitrust injury standard in *Brunswick* and *McCready*. In assessing antitrust injury, this Court examines not only the plaintiff's individual injury but also its relationship to the purposes of the antitrust laws and private enforcement.

1. The *Brunswick/McCready* Test for Antitrust Injury

This Court has articulated a two-part test to determine whether a plaintiff has suffered antitrust injury. First, the plaintiff must show that the defendant's conduct restrains competition. *Brunswick*, 429 U.S. at 487. Second, the plaintiff must prove that its injury flows from either the violation's anticompetitive effects or conduct in furtherance of the anticompetitive objective. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482-83 (1982). This broad-based test was intended to balance the competition and enforcement interests underlying the Sherman Act. It ensures that antitrust recoveries are linked to the purposes of the antitrust laws and eliminates undue limitations on private antitrust enforcement.

The Supreme Court first established the antitrust injury requirement in its seminal *Brunswick* decision. In *Brunswick*, this Court held that the plaintiffs had to prove the defendant's conduct, the source of its injury, restrained competition. The plaintiffs in *Brunswick* contended that the defendant's acquisitions of several financially troubled bowling centers violated Clayton Act § 7 because the defendant's size gave it the capacity to lessen competition in the future. The plaintiffs conceded, however, that the defendant had never actually exercised its market power to reduce competition. Thus,

the plaintiffs could not link their claimed past injury to any actual lessening of competition in the market. In fact, the acquisitions had *enhanced* competition by maintaining the acquired bowling centers as competitors in the market. The Court held that allowing the plaintiffs to recover for continued competition, the very goal of the antitrust laws, would "make § 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws." *Id.* at 487.[6]

Thus, *Brunswick*'s analysis identifies two elements of antitrust injury. A plaintiff must show: (1) conduct producing actual anticompetitive effects, and (2) injury flowing from a reduction, and not an increase, in competition. The Court embodied this two-part inquiry in its oft-quoted antitrust injury formulation:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. at 489 (citation omitted).

In its second antitrust injury opinion, this Court in

---

[6]The *Brunswick* decision made clear that the plaintiff need not prove an actual lessening of competition to recover. Conduct having long term anticompetitive effects (such as predatory pricing) may cause antitrust injury before competitors are actually driven from the market. 429 U.S. at 489 n.14.

McCready clarified the second prong of the *Brunswick* test—the requisite relationship between the plaintiff's injury and the anticompetitive conduct. McCready was a subscriber of Blue Shield's insurance plan. She alleged that Blue Shield conspired with psychiatrists to exclude psychologists from the psychotherapy market. In furtherance of that conspiracy, Blue Shield refused to reimburse subscribers who selected psychologists for treatment instead of psychiatrists.

The Court interpreted *Brunswick* to require only that McCready's injury be linked to the competition policies underlying the antitrust laws. 457 U.S. at 482. That requirement was satisfied if McCready's injury were the direct result of *either* the violation's anticompetitive effect *or* the violator's attempt to pursue its anticompetitive scheme. *Id.* at 482-83.[7] The Court expressly rejected as unrealistically narrow the standard advanced by Blue Shield and adopted by the dissent limiting antitrust injury to that reflecting the most obvious anticompetitive effect of the boycott against the psychologists. *Id.* at 484 n.21.[8]

The Court concluded that "McCready's injury 'flows from that which makes defendants' acts unlawful' within the meaning of *Brunswick*, and falls squarely within the

---

[7]The Court's formulation is consistent with the holding in *Brunswick* that "[t]he injury should reflect the anticompetitive effect *either* of the violation *or* of anticompetitive acts made possible by the violation." 429 U.S. at 489 (emphasis added).

[8]Much like the Ninth Circuit's *Newman* decision, the dissent in *McCready* argued that the proper focus of antitrust injury analysis was on whether the defendant's conduct was anticompetitive (narrowly defined) as to the plaintiff. 457 U.S. at 488-89. The Ninth Circuit's adoption of the very "mirror image" antitrust injury test rejected by this Court illustrates the circuit's utter disregard of established precedent in the antitrust injury area.

area of congressional concern." *Id.* at 484. Blue Shield's scheme sought to reduce artificially the demand for psychologists' services. Blue Shield refused to reimburse subscribers, such as McCready, who chose treatment by psychologists instead of psychiatrists. Forced to incur the additional costs of patronizing a psychologist, McCready bore the brunt of Blue Shield's anticompetitive scheme.

The Court expressly premised its antitrust injury standard on § 4's language and purpose. In enacting § 4 with little restrictive language, Congress sought to enlist private antitrust enforcement in deterring violations, disgorging violators of their illegal profits and compensating victims. *Id.* at 472. These deterrent and remedial purposes governed application of § 4 and could be defeated only by some articulable, statutory policy to the contrary. *Id.* at 472-73.

The Court noted that permitting McCready to recover was consistent with § 4's purposes. Her lawsuit terminated the antitrust violation, disgorged Blue Shield of its unlawful profits and compensated a victim of the violation. *Id.* at 473 n.10. After examining the other procedural hurdles to recovery under § 4,[9] the Court found no countervailing interest dictating a contrary result.

Read together, *Brunswick* and *McCready* articulate a two-part test that should guide antitrust injury analysis by the Ninth Circuit. As of yet, however, the Ninth Circuit has failed to grasp the import of this Court's

---

[9]A showing of antitrust injury is not sufficient to establish the plaintiff's right to recovery. The plaintiff must also satisfy the separate requirements of antitrust standing and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

decisions and has instead applied the "mirror image" formulation of antitrust injury that is inconsistent with this Court's precedent.

2. Newman Satisfies the *Brunswick/McCready* Antitrust Injury Standard

Under the *Brunswick/McCready* antitrust injury test, Paul Newman has clearly suffered antitrust injury from the studios' price-fixing conspiracy. The conspiracy to fix prices unquestionably satisfies the first requirement that the challenged conduct restrain competition. *Brunswick*, 429 U.S. at 487. As to the second part of the test, Universal manipulated Newman's prices in furtherance of the price-fixing conspiracy. *See McCready*, 457 U.S. at 483; *see also Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 12-15 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1301-04 (4th Cir. 1979).

Newman clearly satisfies *Brunswick*'s requirement that the defendant's conduct restrain competition. Horizontal price-fixing is the paradigmatic antitrust violation and is per se unlawful. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The proscription encompasses price-fixing by buyers as well as sellers. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).

It is equally evident that Newman's injury flows from the reduction in competition caused by the studios' price-fixing. The studios' 1981 conspiracy injected fixed prices into the market for artists' services. The conspiracy's direct victims included not only those who negotiated subsequent profit participation agreements but also

those who had existing agreements as of 1981. Up until that time, Universal had paid Paul Newman the market value of his services, expressed in his profit participation agreements as a percentage of the film exhibition revenues. Subsequent to the conspiracy, Universal included only the fixed rate of video revenues, consistent with the objective of the studios' conspiracy. There is nothing to suggest that there was any reason other than the price-fixing conspiracy that induced Universal to pay Newman fixed residual prices, and the defendants did not offer any other reason before the lower courts.[10] Newman's injury flowed from Universal's conduct in furtherance of the conspiracy.[11]

Newman's injury is also consistent with the deterrent and compensatory purposes underlying the private enforcement provisions. The Supreme Court made clear in *McCready* that courts should not "engraft artificial limitations on the § 4 remedy" so as to defeat its broad deterrent and remedial purposes. 457 U.S. at 472-73.

---

[10]The Ninth Circuit concluded that the studios' price-fixing was "unconnected" to Newman's injury as a matter of law. 813 F.2d at 1523. At a minimum, whether Newman's injury resulted from conduct in furtherance of the studios' price-fixing conspiracy is a question of fact. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1058-59 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984). The Ninth Circuit's holding, in the absence of any discovery or factual record, is clearly outside the scope of antitrust injury analysis.

[11]The measure of Newman's damages, the difference between the fixed and competitive prices, flows from the anticompetitive effect of price-fixing arrangements. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 240-41 (1948). Even the more avid proponents of a narrow antitrust injury standard agree. *E.g.*, Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 478-79 (1980).

Absent an articulable consideration of statutory policy, § 4 would be applied according to its broad purposes and the strong public interest favoring antitrust enforcement. *Id.*

The *Newman* decision engrafts precisely the type of artificial, hypertechnical limitation on antitrust injury that this Court warned against in *McCready*. To place the additional burden upon Newman to prove that his injury resulted from a lessening of competition vis-a-vis *his* services hardly furthers the procompetition purposes of the antitrust laws. In fact, the Ninth Circuit's artificial distinction between pre- and post-1981 profit participants produced an outcome contrary to the purposes of the antitrust laws. The studios' price-fixing continues, the studios retain their unlawful profits and a direct victim is denied compensation. In the face of this extraordinary outcome, the Ninth Circuit did not advance any countervailing justification for its restrictive injury test.

The *Newman* decision turns *Brunswick* on its head. Faced with the choice of allowing price-fixers to keep the fruits of their illegal conduct or according antitrust injury to a plaintiff with a "preconspiracy" agreement, courts should come down on the side of the innocent victim and not the wrongdoer.

C. This Court Should Reject the Lower Courts' Misuse of Antitrust Injury to Eviscerate the Antitrust Laws and Should Articulate the Proper Antitrust Injury Analysis

The lower courts have openly defied this Court's *Brunswick/McCready* antitrust injury standard. Spurred by a belief that antitrust violations are in fact procompetitive, these courts have sought to undermine

private enforcement of the substantive laws with which they disagree. Their restrictive injury test intentionally divorces antitrust injury from the purposes of the antitrust laws and serves only their views of what constitutes anticompetitive conduct. This Court should summarily reject the lower courts' efforts to overrule this Court's precedents and Congress' antitrust legislation.

The proponents of a narrow antitrust injury standard proceed from the view that many antitrust violations constitute efficient business conduct. In an article cited by many lower courts, one commentator candidly explains that a restrictive antitrust injury definition is necessary because antitrust violations may be "efficient business relationships" or "aggressive forms of competition." Page, *The Scope of Liability for Antitrust Violations,* 37 Stan. L. Rev. 1445, 1460 (1985). In his view, these antitrust violations cannot cause antitrust injury.

The Supreme Court has rebuffed efforts by antitrust critics to detract from the substantive antitrust offenses.[12] The belief that antitrust compliance will preserve a competitive market structure that presumably will produce better goods and lower prices retains vitality. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

Having failed to persuade this Court and Congress to cut back on the substantive antitrust laws, antitrust

---

[12] *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

critics have turned their attention to the relatively new area of antitrust injury. These courts and commentators have devised the restrictive "mirror image" injury test that is intended to reduce the ability of private litigants to enforce the substantive laws.

The mischief of the restrictive test is that it is simply a vehicle through which antitrust critics inject their views of the antitrust laws into the case law. In accordance with their position that antitrust violations are generally procompetitive, these courts define the violation's anticompetitive effect as narrowly as possible.[13] The requirement that the plaintiff's injury mirror that anticompetitive effect automatically eliminates a substantial number of potential plaintiffs. Moreover, the uncertainty involved in predicting what these courts will pick as the violation's narrowest anticompetitive effect also deters private actions.[14]

---

[13]Under the guise of defining the violation's anticompetitive effects and antitrust injury, some courts have gone further and have rewritten the substantive offense entirely. The substantive laws should delineate the type of competition that the Sherman Act protects. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 532-35 (7th Cir. 1987). These courts, however, use antitrust injury analysis to overrule the substantive laws and substitute their views as to what conduct is anticompetitive. *E.g., Jack Walters*, 737 F.2d at 708-09 (maximum vertical price-fixing constitutes "lawful price competition" and therefore cannot cause antitrust injury); *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197 (7th Cir. 1986) (discounter terminated in furtherance of minimum vertical price-fixing conspiracy does not suffer antitrust injury). These decisions have been criticized as "judicial attempts to undermine the political process by subordinating it to a particular economic view that has not itself attained sufficient support to be legislated into the antitrust laws." Hovenkamp, *Chicago and Its Alternatives*, 1986 Duke L.J. 1014, 1022.

[14]The private litigants' confusion is compounded by the fact that the restrictive antitrust injury test overrules prior precedent and

Thus, in its application, the restrictive antitrust injury analysis radically departs from the purposes of the existing antitrust laws.[15] Whereas *Brunswick* established the antitrust injury requirement to preclude recoveries "divorce[d] . . . from the purposes of the antitrust laws" (429 U.S. at 487), the core concerns underlying the substantive antitrust laws are conspicuously absent from decisions applying the restrictive antitrust injury test. *E.g., In re Industrial Gas Antitrust Litigation,* 681 F.2d 514, 519 (7th Cir. 1982), *cert. denied sub nom. Bichan v. Chemetron Corp.,* 460 U.S. 1016 (1983).

In ignoring the core antitrust concerns, the restrictive antitrust injury test undermines *sub silentio* the current antitrust laws. It eliminates plaintiffs whose lawsuits are consistent with the antitrust laws' interest in preserving the competitive process. This Court must forcefully and unequivocally reject the lower courts' subtle but persistent effort to eviscerate the antitrust laws through the guise of antitrust injury.

---

excludes plaintiffs previously found to have suffered antitrust injury. For example, in its *Newman* opinion, the Ninth Circuit failed even to mention its two prior decisions finding that profit participants suffer antitrust injury from the defendant's violations after the agreements were executed. *See Aurora,* 688 F.2d at 692-93; *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073, 1075 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971).

[15] Although some courts attempt to justify this test by citing fear of excessive treble damages litigation, this fear is groundless. In recent years, this Court has established adequate procedural safeguards to ensure the integrity of private antitrust actions. *E.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752 (1984).

CONCLUSION

Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari to review the direct conflict between the antitrust injury standard articulated by this Court and that applied by the Ninth Circuit.

Respectfully submitted,

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
ALICIA G. ROSENBERG
611 West Sixth Street
Suite 2800
Los Angeles, California 90017
(213) 622-4222

By _____
MAXWELL M. BLECHER
Attorneys for Petitioners

APPENDIX

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL NEWMAN, GEORGE R. HILL and PAN ARTS PRODUCTION CORP., Plaintiffs-Appellants, vs. UNIVERSAL PICTURES and M.C.A., INC. Defendants-Appellees.	No. 85-6347 D.C. # CV-85-2876-JMI (Central California) ORDER

Before: SCHROEDER and FLETCHER, Circuit Judges, and GEORGE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Lloyd D. George, United States District Judge for the District of Nevada, sitting by designation.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL NEWMAN, GEORGE R. HILL and PAN ARTS PRODUCTION CORP.,
Plaintiffs-Appellants,

v.

UNIVERSAL PICTURES and M.C.A., INC.,
Defendants-Appellees.

No. 85-6347
D.C. No. CV-85-2876-JMI
OPINION

Argued and Submitted
April 10, 1986—Pasadena, California

Filed April 6, 1987

Before: Mary M. Schroeder and Betty B. Fletcher, Circuit Judges, and Lloyd D. George.* District Judge.

Opinion by Judge Schroeder

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

SUMMARY

Antitrust

Appeal from judgment dismissing antitrust claim. Affirmed.

*Honorable Lloyd D. George, United States District Judge, District of Nevada, sitting by designation.

This action arises from appellee Universal Pictures' distribution of revenues from the sale and rentals of video cassette versions of the films "Slapshot" and "The Sting." Appellants Newman and Hill contracted with Universal to provide their services in the two films in exchange for a percentage of the revenues. Appellants allege that after the emergence of video cassette technology, Universal and other major motion picture studios conspired to fix the percentage of the revenue paid to artists, including Newman and Hill, for their services, in violation of sections 1 and 2 of the Sherman Act. They do not allege damages in connection with any film agreements entered into after the alleged conspiracy arose. The district court dismissed for failure to state an antitrust claim.

[1] To the extent the complaint alleges only a conspiracy to refuse to pay sums due under pre-conspiracy contracts, Universal's argument that the complaint cannot be read as an antitrust violation is correct. [2] The subsequent conspiracy could not have affected the competition for Newman and Hill's services at the time the contracts were made. [3] Allegations of price-fixing alone, unconnected to any of plaintiffs' activities for which damages are sought, do not set forth a claim under the antitrust laws. [4] The price-fixing conspiracy alleged in this case would clearly have affected competition for film contracts entered into during the existence of the conspiracy, but "Slapshot" and "The Sting" are not such films.

COUNSEL

Maxwell M. Blecher, Los Angeles, California, for the plaintiffs-appellants.

Stephen A. Kroft, Beverly Hills, California, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

This is an appeal from a district court judgment dismissing appellants' antitrust claim. Appellants are Paul Newman, a well-known film actor, George Roy Hill, a prominent film director, and Pan Arts Production Corporation, Hill's closely owned corporation (hereinafter "Newman and Hill"). Between 1972 and 1976, they contracted with appellee Universal Pictures to provide their services in two feature films, "Slapshot" and "The Sting," in exchange for a percentage of the revenues. They filed this action for damages arising out of Universal's distribution of revenues from the sale and rentals of video cassette versions of those films. Appellants allege in their complaint that after the emergence of video cassette technology in the early 1980s, Universal Pictures and other major motion picture studios conspired to fix the percentage of the revenue paid to artists, including Newman and Hill, for their services, in violation of sections 1 and 2 of the Sherman Act. Appellants allege that they therefore received smaller percentages of the cassette revenue for "The Sting" and "Slapshot" than they would otherwise have received. They do not allege damages in connection with any film agreements entered into after the alleged conspiracy arose. The district court dismissed for failure to state an antitrust claim. We affirm.

FACTS

In 1972, Newman entered into a written agreement with Universal in which Universal employed Newman to act in the motion picture "The Sting." In the same year, Hill entered into a written contract with Universal in which Universal employed Hill to direct "The Sting." Both of the 1972 contracts provided that Universal would pay Newman and Hill a contractually defined percentage of the proceeds derived from "The Sting." In 1974, after "The Sting" had been

released, Hill entered into a written contract in which Universal employed Hill and Pan Arts to direct three motion pictures, including "Slapshot." The contract provided that the compensation paid by Universal to Hill and Pan Arts would include a percentage of the net profits from "Slapshot." In 1976, Newman contracted with Universal to act in "Slapshot" in exchange for, inter alia, a percentage of gross proceeds and net profits from the film. Because Newman and Hill were to receive a percentage of film revenues, they are known as "profit participants."

By the early 1980s, after release of "The Sting" and "Slapshot," video disc and video cassette players had become a new medium for viewing feature films. Many studios, including appellee Universal Pictures, began to distribute films on video cassettes for home viewing. Universal has received substantial proceeds from sales and rental of video disc and video cassette versions of "The Sting" and "Slapshot."

In April 1985, Newman and Hill brought this suit against Universal Pictures under Section 4 of the Clayton Act, 15 U.S.C. § 15, seeking damages from Universal Pictures for its alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. Appellants allege that in 1981, Universal conspired with other motion picture studios, including Columbia Pictures, Paramount Pictures, MGM/UA, Twentieth Century-Fox Film Corporation, and Warner Brothers, to apply the profit participation clauses in each of the studios' contracts in a manner that minimized the amount paid to the appellants and other artists.

Newman and Hill allege that rather than paying them the appropriate percentage of all revenues received from "The Sting" and "Slapshot," Universal Pictures and the other studios conspired to minimize this amount by classifying revenue received as "distribution" revenue, rather than production revenue. Under the terms of the contracts, the art-

ists were not entitled to a percentage of distribution revenue, and therefore the alleged conspiracy minimized the amount the studios actually paid to the appellants and other artists.

According to appellants, the alleged agreement to restrict the amount of money that the artists can receive from video cassette revenues constitutes a price-fixing conspiracy which prevents artists, whom appellants characterize as sellers of their services, from obtaining more favorable compensation from the studios, the buyers of the artists' services. In addition to the antitrust claim, the complaint includes pendent state law claims for breach of contract, breach of fiduciary duty, and for an accounting. All claims allege similar damages.

The district court granted Universal Pictures' motion to dismiss the antitrust claim under Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim. The court dismissed the remaining state law claims, without prejudice, for lack of federal jurisdiction. Appellants then brought this appeal, in which the sole issue is whether the complaint states a claim for which relief can be granted under the antitrust laws.

DISCUSSION

We review *de novo* an order dismissing a complaint for failure to state a claim. *Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578, 579 (9th Cir. 1981). A court may dismiss a complaint for failure to state a claim for relief under Fed. R. Civ. P. 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)(citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws. *Lucas v. Bechtel Corp.*, 633 F.2d 757, 760 (9th Cir. 1980).

Universal argues that the complaint cannot be read to allege an antitrust violation, because the appellants entered into these contracts before any conspiracy was alleged to have occurred. Therefore the conspiracy could have had no effect on competition for their services under the contracts for the production of "Slapshot" and "The Sting."

[1] To the extent the complaint alleges only a conspiracy to refuse to pay sums due under pre-conspiracy contracts, Universal Pictures is certainly correct, and appellants so acknowledge. Section 1 of the Sherman Act prohibits conspiracies "in restraint of trade or commerce." Thus, while it is not always necessary to allege that a conspiracy unreasonably restrains trade, it is necessary to show that there is some restraint of trade. *See, e.g., Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 245 (1899); ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984) at 2. In *UNR Industries, Inc. v. Continental Insurance Co.,* 607 F. Supp. 855, 859-61 (N.D. Ill. 1984), the court held that allegations of a conspiracy to breach contracts were insufficient to state a claim under antitrust laws, because the plaintiff failed to show that the conspiracy served to restrain trade. Thus the court noted that "the Sherman Act does not outlaw every action that hurts consumer welfare, it outlaws '[e]very contract, combination . . . or conspiracy [ ] in *restraint of trade.*' " *Id.* at 859 (emphasis in original).

Appellants urge that the complaint is not limited to a contract claim, but that it alleges a sufficient antitrust claim as well. The complaint alleges that appellants' contracts were made before the video cassette technology was available to consumers, and that Universal and other studios conspired to adopt an interpretation of the contracts that minimized the compensation to be paid to profit participants. The complaint states that the defendants' conduct "has the effect . . . of artificially reducing the compensation paid to entities or persons entitled to a share of the proceeds or profits from exhibition of feature films on home video cassettes."

[2] Under the generous standard we apply to antitrust complaints, we must decide whether there is any set of facts consistent with the allegations of the complaint which would establish an antitrust injury to these plaintiffs with respect to the marketing of these films. None has been urged on us. Appellants' fundamental problem is that Newman and Hill entered into the contracts for "The Sting" and "Slapshot" between 1972 and 1976, before the alleged conspiracy arose in 1981. The subsequent conspiracy could not have affected the competition for Newman and Hill's services at the time the contracts were made. Furthermore, the alleged conspiracy could not have affected appellants' ability to negotiate with other studios for distribution of the video cassettes, because the existing contract covered distribution of the film in all forms. It is axiomatic that "[t]o constitute a Section 1 violation, the contract, combination, or conspiracy must be in restraint of trade." E. Kintner, 2 Federal Antitrust Law § 9.19 (1980). Thus, if the alleged conspiracy did not restrain competition for Newman and Hill's services in "The Sting" and "Slapshot," there can be no resulting antitrust violation.

Newman and Hill argue that they need not show antitrust injury because in analyzing a price-fixing conspiracy, an anticompetitive effect is presumed. Newman and Hill's complaint alleges a horizontal price-fixing agreement among buyers of services, which is illegal *per se*. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940). However, although the *per se* rule relieves plaintiff of the burden of demonstrating an anticompetitive effect, which is assumed, it does not excuse a plaintiff from showing that his injury was caused by the anticompetitive acts.

[3] This is because plaintiffs must allege an antitrust injury, which is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[1] *Brunswick Corp. v. Pueblo Bowl-*

[1]Similar concepts sometimes have been expressed in terms of antitrust standing. *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1469 n.2 (9th Cir.

O-Mat, Inc., 429 U.S. 477, 489 (1977). *See also John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 500 (9th Cir. 1977); *Snyco, Inc. v. Penn Central Corp.*, 551 F. Supp. 949, 951-52 (E.D. Penn. 1982). Allegations of price-fixing alone, unconnected to any of plaintiffs' activities for which damages are sought, do not set forth a claim under the antitrust laws. *See Fields Productions, Inc. v. United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

[4] The price fixing conspiracy alleged in this case would clearly have affected competition for film contracts entered into during the existence of the conspiracy, but "Slapshot" and "The Sting" are not such films. Hill and Newman may have other claims in connection with contracts made after 1980, but they are not asserted here.

Affirmed.

Judge George may file a separate statement at a later date.

1985). Courts have also asked whether the plaintiff fell within the "target area" of the violation, or inquired into the "directness" or "indirectness" of the injury, or conducted an analysis of proximate cause. For commentary on the confusion engendered by these disparate approaches, *see Associated General Contractors of California, Inc. v. State Council of Carpenters*, 459 U.S. 519, 535-38 & 536 nn. 31-33; *Haff v. Jewelmont Corp.*, 594 F. Supp. 1468, 1471-79 (N.D. Cal. 1984).

ROSENFELD, MEYER & SUSMAN
STEPHEN A. KROFT
JOHN J. STUMREITER
KIRK M. HALLAM
9601 Wilshire Boulevard
Suite 444
Beverly Hills, California 90210
Telephone: 213/858-7700

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL NEWMAN, GEORGE ROY HILL and PAN ARTS PRODUCTION CORPORATION, Plaintiffs, vs. UNIVERSAL PICTURES, a Division of UNIVERSAL CITY STUDIOS, INC. and MCA, INC. Defendants.	NO. 85 2876 JMI (Px) ORDER GRANTING MOTION TO DISMISS COMPLAINT

APPENDIX C

Defendants' Motion To Dismiss Complaint came on regularly for hearing before the Court on Monday, September 9, 1985, the Honorable James M. Ideman, Judge presiding, and the plaintiffs having appeared by their counsel, Blecher, Collins & Weinstein and Maxwell M. Blecher and Robert M. Lindquist, and defendants having appeared by their counsel, Rosenfeld, Meyer & Susman and Stephen A. Kroft and Kirk M. Hallam, and the Court having considered the Motion, and all papers and documents filed by the parties in support of and in opposition thereto, and having heard argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss Complaint is granted.

2. Count One of the Complaint (Antitrust Violations) is dismissed with prejudice. Counts Two through Four, inclusive, of the Complaint (Pendent State Law Claims) are dismissed without prejudice.

DATED: SEP 12 1985

James M. Ideman

JAMES M. IDEMAN
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ROSENFELD, MEYER & SUSMAN
STEPHEN A. KROFT
JOHN J. STUMREITER
KIRK M. HALLAM

By Stephen A. Kroft

STEPHEN A. KROFT
Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL NEWMAN, et al., PLAINTIFF(S)	CASE NUMBER CV 85-2876-JMI Px)
VS UNIVERSAL PICTURES DEFENDANT(S)	NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that Order Granting Motion To Dismiss Complaint. in the above entitled case was entered in the docket on 9-16-85.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action,

hereby certify that on 9-16-85, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Stephen A. Kroft
Rosenfeld, Meyer & Susman
9601 Wilshire Blvd.
Suite 444
Beverly Hills, CA. 90210

CLERK, U. S. DISTRICT COURT

By F.BLAIR ROBINSON
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 29, 1988, I served the within *Petition for a Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Stephen A. Kroft, Esq.
Rosenfeld, Meyer & Susman
9601 Wilshire Boulevard
Fourth Floor
Beverly Hills, California 90210

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 29, 1988, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)

(2)

No. 87-1617

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

PAUL NEWMAN, GEORGE ROY HILL, and
PAN ARTS PRODUCTION CORPORATION,
Petitioners,

vs.

UNIVERSAL PICTURES, a division of
UNIVERSAL CITY STUDIOS, INC.,
and MCA INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN A. KROFT
(Counsel of Record)
KIRK M. HALLAM
9601 Wilshire Boulevard
Suite 444
Beverly Hills, California 90210
Telephone: 213/858-7700
Attorneys for Respondents Universal City Studios, Inc. and MCA INC.

Of Counsel

ROSENFELD, MEYER & SUSMAN

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

23 pp

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW*

Do plaintiffs suffer antitrust injury merely because their injuries allegedly "flow" from a purported antitrust conspiracy?

---

* Respondent Universal City Studios, Inc. ("Universal") is a wholly owned subsidiary of respondent MCA INC. ("MCA"). MCA and/or Universal have the following partially owned subsidiaries and/or affiliates within the meaning of Supr. Ct. Rule 28.1: Cinema International Corporation N.V.; Cineplex Odeon Corporation; Mood Music Company, Inc.; Overland Stage, Inc.; Quantum Media, Inc.; Supreme Music Corporation; Town Cinema Investments Pty. Ltd.; Western Costume Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities Cited

Rules

Statutes

No. 87-1617

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

PAUL NEWMAN, GEORGE ROY HILL, and
PAN ARTS PRODUCTION CORPORATION,
Petitioners,

VS.

UNIVERSAL PICTURES, a division of
UNIVERSAL CITY STUDIOS, INC.,
and MCA, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The opinion of the Court of Appeals ("Newman") is nothing but a routine application of the antitrust injury principles set forth in numerous decisions of this Court. The Ninth Circuit's opinion proclaims no new rules of law and conflicts with no decisions of this Court or of any lower court. To the contrary, Newman applies settled principles of antitrust law and holds simply that a plaintiff who alleges no injury as a participant in the market allegedly restrained, but instead alleges in conclusory terms only that his injury somehow "flows" from a price-fixing conspiracy, has not met the antitrust injury requirement.

Petitioners brought this suit under Section 4 of the Clayton Act, 15 U.S.C. § 15, seeking damages for respondents' alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and alleging breach of contract and breach of fiduciary duty under state law. The action seeks to recover certain payments allegedly due to petitioners Paul Newman ("Newman") and George Roy Hill ("Hill") under several written contracts between them and respondent Universal Pictures ("Universal") whereby petitioners agreed to render acting and directing services in two motion pictures produced by Universal in the 1970's, and pursuant to which petitioners already have received millions of dollars (CR 13, p. 1 (lines 17-22)). The Complaint attempts to invoke federal jurisdiction over this breach of contract action, and to recover treble damages for the alleged breach, by charging that several years *after* entering into the above-described contracts, respondents formed a conspiracy with several third parties (not named as defendants) which deprived petitioners of the additional payments which they claim are contractually due. The District Court and Court of Appeals both properly ruled that these allegations fail to establish the requisite antitrust injury necessary to permit petitioners to invoke federal antitrust remedies.

The Complaint alleges: In 1972 Newman negotiated and entered into a written agreement with Universal under which Universal employed Newman as an actor in the motion picture "The Sting." Also in 1972, Hill and Universal entered into a written agreement under which Universal employed Hill to direct "The Sting." These contracts provided that Universal would pay Newman and Hill sums equal to a percentage of the contractually defined "net profits" and/or "gross proceeds" received by Universal for "The Sting."

In 1974 and 1976, Newman and Hill entered into two new written contracts with Universal to render their acting and directing services, respectively, in the motion picture "Slapshot." These agreements entitled Newman and Hill to sums equal to a percentage of Universal's contractually defined net profits and/or gross proceeds from "Slapshot." Newman/Hill allegedly performed their services as required by all of the foregoing contracts, and the films were produced and released in theatres, during the 1970's.

Beginning in the late 1970's or early 1980's, after the production and theatrical release of these films, video disc players and video cassette recorders developed as a new medium for exhibition of films such as "The Sting" and "Slapshot." Since the early 1980's Universal has received revenues from the sale and/or rental of discs and cassettes of "The Sting" and "Slapshot."

Petitioners' Complaint further alleges that in 1981 Universal and several other motion picture studios, not named as defendants here, commenced a conspiracy to misinterpret and incorrectly apply the "net profits" and "gross proceeds" definitions contained in the studios' then existing contracts with profit participants. The alleged purpose of the conspiracy was to interpret these contractual definitions in a manner which would decrease the share of video disc and cassette revenues paid to petitioners and other profit participants under these previously negotiated agreements ("pre-conspiracy contracts").[1] The conspiracy to fix the interpretation of pre-

---

[1]Specifically, the Complaint alleges that beginning in 1981 respondents conspired with other motion picture studios to minimize the video cassette revenues paid to profit participants such as petitioners by "allocation of all or most of said revenues as distribution revenues, as opposed to production revenues." (Cplt ¶ 20.) This conspiracy

conspiracy contracts, petitioners allege, constitutes price-fixing and entitles them to treble damages under the antitrust laws, as well as damages for breach of contract. Petitioners do not, however, allege injuries with respect to contracts formed *after* the conspiracy began ("post-conspiracy contracts"), *i.e.*, that they were injured by any inability freely to negotiate the terms and prices of post-conspiracy contracts.

Respondents moved the district court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss petitioners' Sherman Act claims on the grounds that: (1) the alleged conspiracy to misinterpret and/or breach previously formed contracts lacks any anticompetitive effects, since competition for the artists' services ended when the contracts were formed, long before the market restraint allegedly began, and (2) if petitioners also are attempting to allege a conspiracy to fix prices offered for post-conspiracy contracts, their alleged damages do not satisfy the antitrust injury requirement.

The District Court dismissed the Sherman Act claims on these grounds, and dismissed the state law claims for lack of pendent jurisdiction. The Ninth Circuit affirmed, holding that the alleged conspiracy to fix the interpretation of previously formed contracts lacks the anticompetitive effects necessary to support an antitrust claim, and that petitioners did not suffer antitrust injury resulting from any alleged conspiracy to fix prices offered for post-conspiracy contracts.[2] Petitioners subsequently filed, and

---

allegedly "decreased the profits and/or proceeds paid to plaintiffs to which they would otherwise be *contractually* entitled (emphasis added)," thereby purportedly resulting in a breach of contract and an antitrust violation (Cplt ¶ 30).

[2]The Ninth Circuit also implicitly recognized that petitioners — claiming injury only as parties to pre-conspiracy contracts — are not

the Ninth Circuit denied, a Petition for Rehearing and Hearing En Banc. Petitioners then filed this Petition for a Writ of Certiorari, seeking review of the Court of Appeals' holding that the injury alleged in petitioners' Complaint does not constitute antitrust injury. Significantly, petitioners do not seek review of the Ninth Circuit's holding that a conspiracy to misinterpret and/or breach pre-conspiracy contracts lacks the anticompetitive effects necessary to support an antitrust claim.[3]

REASONS FOR DENYING THE WRIT

The petition is remarkable or unusual only in one regard — it involves Paul Newman. In all other respects, it is indistinguishable from every other meritless petition brought by parties dissatisfied with the result below. The petition should be denied because the Court of Appeals' decision does not (1) conflict with the decisions of this Court or of any other federal court, (2) involve any unsettled question of law, or (3) involve any issue of public interest or significance.

---

the "proper party" under the factors of *Associated General Contractors, Inc. v. California State Counsel of Carpenters*, 459 U.S. 519, 103 S.Ct. 897 (1983) to challenge a conspiracy to fix the price offered for post-conspiracy contracts (*see* discussion in note 9, *infra*).

[3]In June, 1987, after the Court of Appeals affirmed the dismissal of their antitrust claims, petitioners commenced an action in California state court for breach of contract and breach of fiduciary duty, based on the same facts as alleged here (Oppos. to Pet. for Rehearing p. 13, App. A thereto). Petitioners already have commenced discovery in this state court action.

I.

The Court of Appeals' Decision Does Not Conflict With the Applicable Decisions of this Court or Involve a Previously Unsettled Question of Law

As the Ninth Circuit correctly recognized, petitioners' "fundamental problem is that Newman and Hill entered into their contracts for 'The Sting' and 'Slapshot' before the alleged conspiracy arose" (Pet. App. B 7), and thus petitioners do not claim any injury as competitors or participants in the market allegedly restrained, i.e., the post-conspiracy market for actors' and directors' services. Most notably, petitioners do *not* allege that the market for actors' and directors' services was restrained in the 1970's, when they entered into their contracts for "The Sting" and "Slapshot." In fact, petitioners concede that all competition for their services in these films was completed long before the alleged conspiracy arose (Pet. 7). Nor do they allege injuries relating to any contracts which were negotiated or formed after the alleged conspiracy arose (Pet. App. B 8).

Petitioners allege *only* that a conspiracy to fix the terms and prices offered for personal services contracts formed in the *1980's* somehow "resulted" in an improper reduction in the monies paid to them for their services in "The Sting" and "Slapshot," in violation of contracts which they freely negotiated with Universal in the *1970's*. As the Court of Appeals properly held, however, and as explained below, this allegation does not satisfy the antitrust injury requirement of Section 4 of the Clayton Act.[4]

---

[4]Petitioners' descriptions of the alleged conspiracy are inconsistent. First they describe the alleged price-fixing conspiracy as one conspiracy applying "both to artists who received residual payments under existing profit participation agreements as of 1981 and to those who signed subsequent agreements" (Pet. p. 4). Later, petitioners

The concept of antitrust injury, first described by the Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690 (1977), and carefully followed by the Ninth Circuit here, requires a plaintiff to allege "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." 429 U.S., at 489. As this Court has held, moreover, only injuries which reflect interference with the Sherman Act's purposes of assuring "to customers the benefits of price competition" and protecting "the economic freedom of participants in the relevant market" are the type the antitrust laws were designed to prevent.[5]

Applying *Brunswick,* the Ninth Circuit concluded that petitioners' injuries are not the type the antitrust laws were designed to prevent, correctly reasoning that because petitioners claim no injuries from contracts *formed*

---

appear to allege only a conspiracy to fix prices for post-conspiracy contracts, asserting that they suffered their alleged injuries because respondents "manipulated Newman's prices *in furtherance* of the price-fixing conspiracy (emphasis added)." (Pet. p. 14.) The Court of Appeals saw two alleged conspiracies, one to refuse to pay sums due under pre-conspiracy contracts, and one to fix prices offered for post-conspiracy contracts (Pet. App. B 6-8). As petitioners have acknowledged, however, whether the conduct alleged is described as two conspiracies, one conspiracy with two components, or a single component conspiracy causing them injuries in furtherance thereof, petitioners still are required to show that the conduct alleged caused them antitrust injury. *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 582-85, 106 S.Ct. 1348, 1354-55 n. 7 (1986), *citing Associated General Contractors,* 459 U.S., at 538-40, 103 S.Ct., at 908-09; and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89, 97 S.Ct. 690, 697 (1977).

[5] *Associated General Contractors,* 459 U.S., at 538, 103 S.Ct., at 908-09; *see also, Matsushita,* 475 U.S., at 582-84, 106 S.Ct., at 1354; *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S.Ct. 484 (1986) (reaffirming antitrust injury requirement).

during the existence of the alleged price-fixing conspiracy, the alleged harm to their preconspiracy contract interests is not sufficiently, if at all, connected to the market restraint alleged.[6]

Petitioners nevertheless assert, without any factual explanation or supporting allegations, that the alleged breaches of their contracts for "The Sting" and "Slapshot" constitute antitrust injury because those injuries allegedly are a "direct result" of the conspiracy to fix prices for post-conspiracy contracts. Petitioners are wrong. Mere unsupported and conclusory allegations that petitioners' injuries are "directly" or "proximately" caused by the alleged price-fixing conspiracy do *not* satisfy the antitrust injury requirement. Petitioners must allege "more than injuries causally linked to an illegal presence in the market," *Brunswick,* 429 U.S., at 489, 975 S.Ct., at 697. As noted above, they also must prove injury of the type the antitrust laws were intended to prevent *and* that flows from that which makes defendants' acts unlawful. "The injury should reflect the *anticompetitive effect* either of the violation or of *anticompetitive acts* made possible by the violation (emphasis added.)." *Id.,* at 489; 97 S.Ct., at 697.[7]

---

[6]In so ruling, the Ninth Circuit correctly applied the standards of *Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229 (1984), where this Court declared that a motion to dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) should be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." (Pet. App. B 5, 7-8).

[7]*See also, Matsushita,* 475 U.S., at 588-89, 106 S.Ct., at 1357; *Cargill,* ____U.S., at ____, 107 S.Ct., at 489; *Associated General Contractors,* 459 U.S., at 534-35, 103 S.Ct., at 906-07 (reaffirming that allegations of injury merely causally related to antitrust violation not sufficient).

Nor are petitioners correct in stating (Pet. 6) that the Ninth Circuit "assumed that the price-fixing conspiracy directly and proximately caused" petitioners' alleged injuries. To the contrary, it held that petitioners have not urged any facts supporting a causal connection between their injuries and an antitrust violation (Pet. Ap. B. 7-8). Indeed, petitioners never have alleged, or even proffered in their briefs to the lower courts or to this Court, facts explaining the alleged causal link between a conspiracy to depress prices offered for post-conspiracy contracts and the alleged harm to their pre-conspiracy contractual interests. As this Court noted in *Associated General Contractors,* courts may not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." 459 U.S., at 526, 103 S.Ct., at 902.

Petitioners also contend that *Newman* is inconsistent with *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 102 S.Ct. 2540 (1982), because under their reading of *McCready* petitioners purportedly are required to allege only that their injuries "flow" from respondents' alleged conduct "in furtherance of the conspiracy." (Pet. pp. 14-15.) Petitioners again are wrong. The antitrust injury requirement is *not* satisfied merely by pleading damage which somehow merely "flows" from an antitrust violation, as this Court in *McCready* and *Associated General Contractors,* 459 U.S., at 538-40, 103 S.Ct., at 908-10, clearly held.

In *McCready,* plaintiff was a consumer in the market for psychotherapeutic services who refused to cooperate with the defendant medical insurer in carrying out a boycott of psychologists. As a sanction for plaintiff's refusal to boycott psychologists, she was forced to pay increased costs for psychotherapeutic services when the defendant denied her insurance coverage for treatment by

a psychologist. *Id.*, at 483, 102 S.Ct., at 2550. The Court found that plaintiff alleged antitrust injury because she was injured as a consumer in the relevant market, and her injury was "a necessary step in effecting the ends of the alleged conspiracy," the "very means by which [defendant] sought to achieve its illegal ends." *Id.*, at 479, 102 S.Ct., at 2548.

In stark contrast, petitioners here do not allege injuries suffered as consumers or participants in the market allegedly restrained, since they claim no damages from contracts formed after commencement of the alleged conspiracy. Nor do they allege injuries which were "a necessary step" in the conspiracy, or "the very means" by which the conspiracy was achieved. In short, petitioners' alleged injuries are patently dissimilar to those which this Court in *McCready* found to constitute antitrust injury.

As *McCready* itself makes clear, the Clayton Act does *not* provide antitrust remedies for all injuries — such as those alleged by petitioners — which allegedly "flow" from conduct related to an antitrust violation. 457 U.S., at 476-77. ("Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for injury to his business or property.") In addition to being causally connected to an antitrust violation, an antitrust plaintiff's alleged injuries also must be the type of injuries Congress intended to redress in enacting the antitrust laws.[8] Peti-

---

[8]Under petitioners' mistaken interpretation of *McCready*, a pedestrian struck by a motorist hurrying to carry out the illegal objectives of an antitrust conspiracy would suffer the requisite antitrust injury, since that pedestrian's injuries arguably would flow from conduct in furtherance of the conspiracy. Such an extreme result clearly is not permitted by this Court's decisions. *See, e.g., Associated General Contractors*, 459 U.S., at 538-40, 103 S.Ct., at 908-10 (citing and explaining *McCready*).

tioners' ordinary state law breach of contract claims clearly do not suffice.[9]

II.

The Newman Decision Does Not Adopt A "Mirror Image" Test or Conflict With Other Lower Court Decisions

In an effort to create the impression that an intercircuit conflict exists as to the proper test for antitrust injury, petitioners assert that *Newman* adopted and applied a

---

[9]As the Court of Appeals' decision recognized, petitioners' injuries also fail to satisfy the more exacting "property party" criteria set forth in *Associated General Contractors* (*see* Pet. App. B 7-8 n. 1). Under the analytical framework established in *Associated General Contractors*, "[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons." *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S.Ct. 484, 489 (1986). Applying *Associated General Contractors* to petitioners' alleged injuries, petitioners are not proper parties for at least two of these other reasons: First, petitioners' alleged injuries with respect to their pre-conspiracy contracts are connected only very remotely, if at all, to the antitrust violation alleged. The tenuous nature of this causal connection is highlighted by the fact that whether petitioners have suffered any injury at all is entirely dependent on the outcome of the contract interpretation issue, *i.e.*, if petitioners have been compensated correctly under the language of their pre-conspiracy contracts for "The Sting" and "Slapshot," they have suffered no lost revenues about which to complain. Second, there is a large identifiable class of persons, *i.e.*, artists purportedly unable freely to negotiate contracts *formed during the existence* of the 1980's conspiracy, who would be far more directly affected by the alleged conspiracy than petitioners, and should be highly motivated to challenge this alleged antitrust conspiracy. Hence, the antitrust violation, if one exists, is not likely to go undetected or unremedied by the denial of proper party status to petitioners.

new, more restrictive test for antitrust injury, which petitioners coin the "mirror image" test (Pet. 7-8). Yet the Court of Appeals opinion neither mentions a "mirror image" test nor applies a more restrictive concept of antitrust injury. To the contrary, as discussed in Section I, *supra, Newman* does nothing more than recite and apply the language and principles of antitrust injury articulated by this Court in *Brunswick,* and affirmed by the Court in subsequent decisions. Notwithstanding petitioners' unsupported, sweeping generalization to the contrary, no federal court has adopted a more restrictive "mirror image" test for antitrust injury, a test which petitioners themselves have invented.

Moreover, petitioners are mistaken in citing two 1982 Seventh Circuit cases as purported examples of a conflict between the decisions of the Seventh and Ninth Circuits, *i.e., Repp v. F.E.L. Publications, Ltd.,* 688 F.2d 441 (7th Cir. 1982), and *In re Industrial Gas Antitrust Litigation,* 681 F.2d 514 (7th Cir. 1982). Both of these outdated Seventh Circuit decisions applied the so-called "target area" test which later was disapproved by this Court in *Associated General Contractors,* 459 U.S., at 536, 103 S.Ct., at 908, n. 33. Hence, these decisions no longer are viable precedents either in the Seventh Circuit or in other circuits. Any intercircuit conflict previously created by the application of the target area test was resolved by this Court's decisions in *Associated General Contractors,* 459 U.S. 519, 103 S.Ct. 897; *Matsushita,* 475 U.S. 574, 106 S.Ct. 1348; and *Cargill,* ____ U.S. ____, 107 S.Ct. 484, which eliminated the prior doctrinal confusion.

The Ninth Circuit in *Newman,* as in each of its other decisions involving the antitrust injury requirement,[10] unerringly applied the test announced by this Court in *Brunswick, i.e.,* whether the alleged injuries are the type of injuries the antitrust laws were designed to prevent. *Newman's* routine application of *Brunswick* conflicts with no other court of appeals or district court decision, and creates no conflict between Ninth Circuit decisions, as the lower court acknowledged by denying the petition for an *en banc* hearing.[11]

---

[10]*See Lucas v. Bechtel Corp.,* 800 F.2d 839 (9th Cir. 1986); *Eagle v. Star-Kist Foods, Inc.,* 812 F.2d 538 (9th Cir. 1987) (applying *Brunswick* requirement).

[11]As they did in their petition for rehearing in the Court of Appeals, petitioners here claim that *Aurora Enterprises, Inc. v. National Broadcasting Co., Inc.,* 688 F.2d 689 (9th Cir. 1982), and *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073 (9th Cir. 1970) conflict with *Newman.* Petitioners are mistaken. In both *Aurora* and *Mulvey,* profit participants alleged that competition for licenses to exhibit their own films was restrained by block-booking conspiracies which forced exhibitors who wished to obtain licenses to exhibit plaintiffs' films also to purchase exhibition licenses for other less desirable films. Thus, plaintiffs in *Aurora* and *Mulvey* alleged illegal restraints *in the market for licensing of their own films,* which deprived them of revenues from such licensing. In sharp contrast, petitioners here do not claim any restraint in the market for *licensing* of their films, nor do they claim that the market for their *services* in "The Sting" and "Slapshot" was restrained, since they allege that the "price-fixing" conspiracy arose after their contracts were negotiated and formed.

III.

The Newman Decision Does Not Involve Any Issue of Public Interest

Petitioners assert that *Newman* is a case of enormous public significance, presenting the Court with a "perfect opportunity" to issue new guidelines for antitrust injury analysis (Pet. 16-20). This contention is completely devoid of merit. *Newman* is nothing more than a private contractual dispute regarding the proper allocation of receipts among the parties to those contracts, and involves a conventional application of this Court's well-established antitrust injury requirement to simple, albeit somewhat peculiar, factual allegations. The Court of Appeals' decision marks no change in antitrust injury analysis and prevents no actual victims of a price-fixing conspiracy from pursuing antitrust remedies.

Nor are the lower courts in need of any "new guidelines" for antitrust injury analysis.[12] Petitioners' contention (Pet. 17-19) that the lower courts are misapplying this Court's antitrust injury requirement to eviscerate the substantive antitrust laws is simply untrue. Petitioners cite no case or commentary which articulates or applies a more restrictive antitrust injury test that undermines enforcement of the antitrust laws.[13]

---

[12]Petitioners, while expressing the need for "new antitrust injury guidelines," give no suggestion in their petition as to the nature of the new guidelines which purportedly are needed. In the Court of Appeals, however, petitioners mistakenly attempted to resurrect the defunct "target area" test as the correct standard for determining whether they are a "proper party" under Clayton Act § 4. (Appellants' Open. Brief p. 25).

[13]Petitioners cite three Seventh Circuit cases which they claim exemplify the lower courts' use of antitrust injury to rewrite substantive antitrust law, *i.e., Jack Walters and Sons Corp. v. Morton Bldg.,*

Even if petitioners could point to lower court decisions which misapply the concept of antitrust injury to alter substantive antitrust law, *Newman* clearly is not such a case. The Court of Appeals' decision contains no suggestion of an attempt to eviscerate substantive antitrust laws or to alter in any manner the necessary elements of a price- fixing violation. In fact, *Newman* acknowledged that price-fixing is a *per se* antitrust violation and that under the *per se* rule a plaintiff need not prove the anticompetitive effects of the violation alleged (Pet. App. B 7). The court also correctly recognized, however, that even plaintiffs who allege *per se* violations must show antitrust injury from the illegal conduct alleged. The Ninth Circuit assumed that the alleged price-fixing conspiracy "would clearly have affected competition for film contracts entered into during the existence of the conspiracy," and invited petitioners to assert antitrust injuries with respect to such post-conspiracy contracts (Pet. App. B 8). Petitioners have not done so.

In sum, the *Newman* decision serves to promote, not undermine, the public interest in proper enforcement of the antitrust laws. By applying the limits which this

---

Inc., 737 F.2d 698, 708-09 (1984); *Local Beauty Supply, Inc. v. Lamaur, Inc.*, 787 F.2d 1197 (1986); and *In re Industrial Gas Antitrust Litigation*, 681 F.2d 514, 519 (1982) (Pet. 18 fn. 13). None of these cases is before the Court on this petition, however, and none seeks to rewrite substantive antitrust law. *Jack Walters* simply follows the holding of *Brunswick* that injury caused by an *increase* in competition is not antitrust injury. *Local Beauty* assumes that the conduct alleged *is* a substantive antitrust violation, but finds that the plaintiff is not the proper party to challenge it. And *In re Industrial Gas* makes no attempt to alter the offense of price-fixing alleged there, and is no longer a viable precedent at any rate since it applied the now defunct "target area" test which subsequently was disapproved by this Court in *Associated General Contractors*, 459 U.S., at 536 n. 33, 103 S.Ct., at 907-08.

Court has established for antitrust actions under Section 4 of the Clayton Act, *Newman* ensures that only those suffering the type of injuries the antitrust laws were designed to prevent can sue to enforce those laws. *Newman* effects no harm to the public interest and deals no injustice to petitioners. As the Court of Appeals correctly perceived, this litigation involves nothing more than a private dispute as to the proper interpretation of the parties' contracts, a dispute which the Court of Appeals appropriately left for resolution in petitioners' ongoing state court action.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,
STEPHEN A. KROFT,
(Counsel of Record)
KIRK M. HALLAM
Attorneys for Respondents
Universal City Studios, Inc.
and MCA INC.

Of Counsel
ROSENFELD, MEYER & SUSMAN

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 20, 1988, I served the within Respondents' Brief in Opposition to Petition for Writ of Certiorari in re: "Paul Newman vs. Universal Pictures" in the United States Supreme Court, October Term 1987, No. 87-1617;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Maxwell M. Blecher
Blecher & Collins
611 West 6th Street
28th Floor
Los Angeles, California 90017

All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on May 20, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

No. 87-1617

In the Supreme Court of the United States

October Term, 1987

PAUL NEWMAN, GEORGE ROY HILL, AND PAN ARTS PRODUCTION CORPORATION,

Petitioners,

v.

UNIVERSAL PICTURES, a division of UNIVERSAL CITY STUDIOS, INC., and MCA, INC.,

Respondents.

PETITIONERS' REPLY BRIEF

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
ALICIA G. ROSENBERG
611 West Sixth Street
Suite 2800
Los Angeles, California 90017
Telephone: (213) 622-4222

Attorneys for Petitioners

Westside Law Publishers Los Angeles, California (213) 477-0491

TABLE OF AUTHORITIES

No. 87-1617

In the Supreme Court of the United States

October Term, 1987

PAUL NEWMAN, GEORGE ROY HILL, AND PAN ARTS PRODUCTION CORPORATION,

Petitioners,

v.

UNIVERSAL PICTURES, a division of UNIVERSAL CITY STUDIOS, INC., and MCA, INC.,

Respondents.

PETITIONERS' REPLY BRIEF

Respondents' mistaken antitrust injury argument only emphasizes the need for this Court to articulate the proper analytical framework for evaluating antitrust injury.

The operative facts and legal issue before this Court are simple.[1] In the 1970's, Newman[2] and Universal

[1] Respondents' opposition disputes some of the petitioners' allegations concerning the nature of the conspiracy. As this case was dismissed at the complaint stage, the petitioners' allegations must be taken as true and all inferences drawn in their favor. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

[2] This brief will refer to petitioners Paul Newman, George Roy Hill and Pan Arts Production Corporation collectively as "Newman", and to respondents Universal Pictures and MCA, Inc., collectively as "Universal."

entered into contracts under which Newman agreed to provide acting services in "The Sting" and "Slapshot," and Universal agreed to pay him a percentage of the films' gross proceeds from various sources of distribution. These residual payments are made on an annual basis and continue so long as the films produce revenue. Beginning in 1981, Universal and other major motion picture studios conspired to fix prices paid to all industry artists from video revenues. In each year since 1981, therefore, Newman's residual payments have been based on a conspiratorially fixed price rather than the competitive, market-established price for which he bargained. The sole issue is whether given these facts Newman has suffered antitrust injury.[3]

The crux of the respondents' opposition is that even if Newman receives fixed prices for his services, he does not suffer antitrust injury from the studios' conspiracy. Respondents' entire argument rests on the assumption that the only anticompetitive effect of price-fixing is on the bargaining process prior to entering into the contracts. Therefore, because Newman's contracts were signed before the studios' conspiracy began, respondents contend that Newman's receipt of fixed prices cannot "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

---

[3] The Ninth Circuit's decision rests solely on the issue of antitrust injury. Contrary to respondents' contention, the Ninth Circuit did *not* analyze or rule on the separate question of Newman's antitrust standing.

Respondents' antitrust injury analysis is neither "routine" nor consistent with the standards stated in *Brunswick* and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Antitrust injury analysis does not, as respondents suggest, isolate one anticompetitive effect of a violation and then determine whether the plaintiff's injury mirrors that effect. Such a standard is unduly narrow and wholly unworkable. Violations can have many competition-restraining effects, and litigants cannot predict in advance which one among several a court will pick.

This Court's *Brunswick/McCready* antitrust injury analysis requires only that the plaintiff's injury flow from an antitrust violation that reduces competition. Applying the Court's standard to this case, horizontal price-fixing is condemned because it distorts prices that would otherwise be set by free market forces. Therefore, the antitrust laws are concerned with sellers, such as Newman, who receive artificially depressed prices for their services. The difference between the fixed and competitive prices is a measure of both the plaintiff's individual damages and the conspiracy's market-distorting effects. *See Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 240-41 (1948).

There should not be any serious question that one who receives (or pays) fixed prices suffers the type of injury the antitrust laws were intended to prevent. These damages result directly from horizontal price-fixing, which always reduces competition. Logically, the distinct concept of antitrust injury cannot limit such recoveries. Petitioners respectfully request that this Petition for Writ

of Certiorari be granted to explicate proper antitrust injury analysis.

Respectfully submitted,

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
ALICIA G. ROSENBERG
611 W. Sixth Street
Suite 2800
Los Angeles, California 90017
(213) 622-4222

By _____
MAXWELL M. BLECHER
Attorneys for Petitioners

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 2, 1988, I served the within *Petitioners' Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Stephen A. Kroft, Esq.
Rosenfeld, Meyer & Susman
9601 Wilshire Boulevard
Fourth Floor
Beverly Hills, California 90210

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2, 1988, at Los Angeles, California.

Betty J. Malloy
(Original signed)